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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	R.06-10-005

OPENING COMMENTS OF

CALAVERAS TELEPHONE COMPANY (U 1004 C)
CAL-ORE TELEPHONE CO. (U 1006 C)
DUCOR TELEPHONE COMPANY (U 1007 C)
FORESTHILL TELEPHONE CO. (U 1009 C)
GLOBAL VALLEY NETWORKS, INC. (U 1008 C)
HAPPY VALLEY TELEPHONE COMPANY (U 1010 C)
HORNITOS TELEPHONE COMPANY (U 1011 C)
KERMAN TELEPHONE CO. (U 1012 C)
PINNACLES TELEPHONE CO. (U 1013 C)
THE PONDEROSA TELEPHONE CO. (U 1014 C)
SIERRA TELEPHONE COMPANY, INC. (U 1016 C)
THE SISKIYOU TELEPHONE COMPANY (U 1017 C)
VOLCANO TELEPHONE COMPANY (U 1019 C)
WINTERHAVEN TELEPHONE COMPANY (U 1021 C)

ON PROPOSED DECISION OF COMMISSIONER CHONG RESOLVING ISSUES IN PHASE II

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September 13, 2007

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I. INTRODUCTION.

Pursuant to Rule 14.3 of the California Public Utilities Commission's Rules of Practice and Procedure ("Commission"), Calaveras Telephone Company (U 1004 C), Cal-Ore Telephone Co. (U 1006 C), Ducor Telephone Company (U 1007 C), Foresthill Telephone Co. (U 1009 C), Global Valley Networks, Inc. (U 1008 C), Happy Valley Telephone Company (U 1010 C), Hornitos Telephone Company (U 1011 C), Kerman Telephone Co. (U 1012 C), Pinnacles Telephone Co. (U 1013 C), The Ponderosa Telephone Co. (U 1014 C), Sierra Telephone Company, Inc. (U 1016 C), The Siskiyou Telephone Company (U 1017 C), Volcano Telephone Company (U 1019 C), and Winterhaven Telephone Company (U 1021 C) (the "Small LECs") hereby offer these opening comments on the Proposed Decision of Commissioner Chong Resolving Issues in Phase II ("Proposed Decision").

Contrary to the language and intent of the Digital Video Infrastructure and Competition Act of 2006 ("DIVCA"), the Proposed Decision adopts the same build-out and non-discrimination requirements for smaller providers as for AT&T and Verizon, subject to certain limited exceptions. The application of the low-income standards under Public Utilities Code Section 5890(b) to providers with less than one million video customers is particularly unjustified, as this requirement will lead to interpretive ambiguities and potentially expose small video providers to allegations of discriminatory build-out where no such discrimination has taken place. The Proposed Decision's requirement that smaller providers affirmatively demonstrate the reasonableness of their build-out plans in advance is also inconsistent with DIVCA's legislative intent. The Commission should reject this approach, and permit smaller providers to build out in the manner that best suits their customers and their service territory. The Commission should rely on the data submitted under General Order ("G.O.") 169, Section VII, to detect and appropriately address any allegations that providers have built out in a discriminatory or unreasonable manner.

If the Commission does require smaller providers to pre-qualify their build-out plans, the Proposed Decision appropriately recognizes that these providers must be offered a safe harbor. A provider that has met the same build-out benchmarks as the larger providers under Public Utilities Code Section 5890(e) should certainly be immune from an allegation that its build-out is unreasonable. However, it would be more consistent with DIVCA to adopt a safe harbor that is less rigorous than that applied to the larger providers, such as the more flexible standard proposed by SureWest TeleVideo. If the Commission does adopt a safe harbor based on Section 5890(e), smaller providers who do satisfy the safe harbor should be entitled to benefit from the automatic extension provisions in Sections 5890(e)(3) and (4). Further, both the automatic extension option under Section 5890(e) and the discretionary extension procedure under Section 5890(f) should be incorporated into G.O. 169.

The Commission should also reject the proposed video subscribership reporting in the Proposed Decision, as this information is not necessary for the Commission to discharge its monitoring duties under DIVCA. The Small LECs support the Proposed Decision in all other respects, including its approach to franchise renewal and notices of "imminent market entry."

II. THERE IS NO STATUTORY BASIS OR REASONABLE JUSTIFICATION FOR APPLYING THE LOW-INCOME PENETRATION QUOTAS IN PUBLIC UTILITIES CODE SECTION 5890(b) TO SMALLER VIDEO PROVIDERS.

The Proposed Decision's proposal to apply specific low-income customer penetration percentages to small video providers constitutes legal error. Public Utilities Code Section 5890(b) prescribes specific low-income penetration requirements for video franchise holders with more than one million telephone customers. Section 5890(b) embodies a negotiated compromise between the large ILECs and the Legislature, under which AT&T and Verizon

agreed that their respective video footprints would be comprised of at least 25% low-income households within three years, and at least 30% low-income households within five years.

The Legislature adopted no such requirement for smaller providers. Rather, smaller providers are subject to the general non-discrimination prohibition under Public Utilities Code Section 5890(a), which states that franchise holders "may not discriminate against or deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which the group resides." Pub. Util. Code § 5890(a). Between the Commission's general adjudicatory and investigatory powers, and the specific low-income data reporting requirements of General Order 169, Section VII(C)(1)(4), the Commission has ample tools with which to ensure that discriminatory build-out is not taking place.

The Proposed Decision's establishment of low-income penetration quotas for smaller providers is contrary to both the language and the intent of DIVCA. In construing a statute, the Commission must consider the "context of the statute as a whole and the overall statutory scheme." *Smith v. Superior Court*, 39 Cal.4th 77, 83 (2006). DIVCA must be interpreted in a manner that gives "significance to every word, phrase, sentence, and part [of the statute] in pursuance of the legislative purpose." *Id.* The Proposed Decision's low-income penetration requirements violate the "cardinal rule of statutory construction" that entities called upon to interpret statutes "must not add provisions to statutes." *People v. Guzman*, 35 Cal.4th 577, 587 (2005); *see also* Cal. Code Civ. Proc. § 1858 (in interpreting a statute, a court or administrative agency is bound "not to insert what has been omitted, or to omit what has been inserted.")

Nothing in Public Utilities Code Section 5890 or any other part of the statute supports the application of the 25% and 30% thresholds to smaller providers. If the Legislature had intended smaller video providers to be subject to the exact same requirements as the large providers, it would not have limited Section 5890(b) to "holders or their affiliates with more than 1,000,000

telephone customers." Pub. Util. Code § 5890(b). The Legislature very easily could have written the statute without the one million customer threshold. If the Legislature had intended to apply the low-income penetration quotas to all providers, it also could have conflated the general non-discrimination provisions in Section 5890(a) with the specific provisions in Section 5890(b). Yet another construction of the DIVCA non-discrimination requirements would have been to grant authority to the Commission to adopt low-income penetration rules for smaller providers. Significantly, the Legislature pursued none of the approaches that would have supported the low-income requirements in the Proposed Decision.

The structure and broader context of DIVCA provide further testaments to the impropriety of the Proposed Decision's low-income requirements. The language of DIVCA was carefully crafted to reflect the series of negotiated compromises that gave rise to the legislation. As the Commission and many of the interested parties have emphasized, DIVCA is a narrowly-tailored statute under which the Commission has specifically-enumerated powers. In D.07-03-014, the Commission acknowledged that its role in the video franchising process is "a limited one," and that the Commission "may not impose any requirement on any holder of a state franchise except as expressly provided by . . . the Act." D.07-03-014, *mimeo*, at p. 3 (citing Pub. Util. Code § 5840(a)). Although the Commission has authority under Public Utilities Code Section 5890 to ensure that video build-out occurs in a reasonable and non-discriminatory manner, the Commission is bound by the specific provisions in Section 5890.

The legislative history underlying DIVCA further demonstrates that the specific low-income quotas in Section 5890(b) were never intended to apply to smaller providers. The August 28, 2006 Senate Analysis of the draft legislation states that the "authors [of DIVCA] have negotiated buildout commitments from each of the largest two telecommunications

companies." August 28, 2006 Senate Analysis, at p. 4.[1] The same document notes that the Verizon and AT&T "agreed to a specific test for ensuring that discrimination is not occurring," under which "within three years at least 25% of the households being offered video service are low income, and 30% within five years . . . ." *Id.* The Senate Analysis does not mention applying these same standards to smaller providers. Indeed, an earlier Senate analysis describes the standards as "far more than either company has agreed to in any other state." *Id.*. Given that the Senate acknowledged these low-income penetration benchmarks as aggressive even for large companies, it is very unlikely that the Legislature would have endorsed an application of the same standards to smaller providers. An explicit part of the justification for applying these standards to AT&T and Verizon was that "surely Fortune 500 companies can make commitments of longer than 2 years." *See* June 29, 2006 Senate Analysis, Section 4.[2].

In addition to deviating from statutory intent, the Proposed Decision's low-income requirements raise technical problems that could create significant competitive disadvantages for Small LECs in rolling out video service pursuant to state-issued franchises. While the 25% and 30% benchmarks may be appropriate for mega-corporations like Verizon and AT&T, they make little sense for rural ILECs with small customer bases and limited access to capital. While the large ILECs have sufficient numbers of telephone customers to approximate the distribution of incomes in the state generally, this may not be true in Small LEC territories. Some Small LECs may not have 25% low-income households in their entire service areas, let alone in the places that they are able to provide video service.

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[1] The August 28, 2006 Senate Analysis is available at the following link: http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_2951-3000/ab_2987_cfa_20060828_211945_sen_floor.html

[2] The June 29, 2006 Senate Analysis is available at the following link: http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_2951-3000/ab_2987_cfa_20060629_101140_sen_comm.html.

Under the Proposed Decision's approach, a Small LEC whose customer base includes only 10% low-income households would have to make a specific showing that its build-out includes at least 10% low-income individuals. With small, sparse, rural populations, implementing such a requirement can lead to perverse results. For example, consider a Small LEC with 1,000 households, 100 of which qualify as "low-income." If this Small LEC builds out to 80% of its households, it must show that its footprint includes at least 80 low-income households. Unlike in an urban area, these 80 low-income households may bear no geographic relation to each other. That is, there may be no particular area where the provider could build to sweep in all of these 80 households. There may be no systematic way for the Small LEC to ensure that it meets the low-income requirement. Companies facing these circumstances may be wary of applying for a state franchise. Alternatively, they may be forced to undertake the significant cost of specifically targeting a very small number of geographically-dispersed low-income households in manner that deviates from a rational build-out. The Proposed Decision seems to acknowledge the problem with applying this requirement to Small LECs, but it fails to propose an adequate solution.

Rather than imposing a low-income penetration quota on smaller providers that was never intended for them, the Commission should simply rely on the general non-discrimination standard in Public Utilities Code Section 5890(a). Under Section VII(C)(4)(1) of G.O. 169, the Commission will be collecting information about all providers' build-out relative to low-income households. To the extent that an instance of non-discrimination arises that requires Commission intervention, the Commission is well-positioned to learn of it, and to address it. Consumer complaints are another avenue through which true violations of the non-discrimination standard could come to light. Given that the Commission has these vehicles for addressing non-discrimination, the approach in the Proposed Decision is unnecessary. When the costs and

uncertainties of the quota approach for smaller providers are considered, it is clear that applying these low-income requirements to providers with less than one million telephone customers is inconsistent with DIVCA's objectives of creating a "fair and level playing field for all market competitors that does not disadvantage . . . one service provider . . . over another." Cal. Pub. Util. Code § 5810(a)(2)(A). For all of these reasons, the specific low-income quota requirements for smaller providers must be removed from the Proposed Decision.

III. THE BUILD-OUT REQUIREMENTS IN THE PROPOSED DECISION ARE INCONSISTENT WITH THE LEGISLATURE'S INTENT THAT SMALLER PROVIDERS SHOULD HAVE ADDITIONAL FLEXIBILITY IN DEMONSTRATING THE REASONABLENESS OF THEIR BUILD-OUT UNDER PUBLIC UTILITIES CODE SECTION 5890(c).

Like the low-income requirements discussed above, the pre-qualification procedure in the Proposed Decision is an improper expansion of the statutory framework outlined in DIVCA. Unless a smaller provider can meet the safe harbor standards in Public Utilities Code Section 5890(e), the Proposed Decision would require the provider to file a separate Commission application within the first year of receiving a franchise to demonstrate the reasonableness of its build-out plan. *See Proposed Decision*, O.P. 2(a). Under Public Utilities Code Section 5890(c), franchise holders with fewer than one million telephone customers are required to build out their footprints "within a reasonable time." Pub. Util. Code § 5890(c). Whereas AT&T and Verizon agreed to specific build-out requirements during the legislative process, the Small LECs negotiated a flexible approach to build-out that would acknowledge the important differences between large and small video providers. This approach is embodied in Section 5890(c). The Proposed Decision ignores this flexible build-out standard. Under the Proposed Decision, smaller providers would be forced to either meet the same requirements as the large providers (in Public Utilities Code Section 5890(e)), or undertake the expensive and time-consuming process

of documenting the reasonableness of their build-out through a Commission application. Neither of these outcomes is reasonable for smaller providers.[3]

Applying Section 5890(e) to smaller providers contravenes the legislative intent underlying DIVCA. As discussed in connection with the low-income requirements, the Commission must follow established principles of statutory construction in interpreting the DIVCA statutes. The Commission must give meaning to all of the terms in the statutes in relation to DIVCA as a whole, and interpret the language in light of the underlying goals of the legislation. The Proposed Decision fails to adequately account for the structure of Section 5890, which clearly distinguishes between smaller providers and larger providers in terms of build-out requirements. Further, as noted above, the June 19, 2006 Senate Analysis explicitly mentions the negotiated build-out requirements for the large companies, but it makes no mention of any similar requirements for other franchisees. Whatever the build-out requirements are for smaller providers, they should be less onerous than for AT&T and Verizon. The Proposed Decision fails to recognize this important principle.

As the Small LECs have urged in previous comments in this proceeding, the Commission should not attempt to determine in advance what a "reasonable" build-out plan would be for each smaller provider. Rather, each smaller providers should have the flexibility to build out its video footprint in an organic manner that best suits its particular business model and customer needs. To the extent that the Commission's monitoring of the build-out reveals gross inadequacies or discrimination, the Commission has ample tools through which to take corrective action. Requiring smaller providers to file Commission applications to demonstrate the reasonableness

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[3] The Proposed Decision notes that "all commenters on this issue except SureWest TeleVideo and Small LECs support this approach." *Proposed Decision*, at p. 15. This statement is unremarkable, since SureWest and the Small LECs are among the few providers in the state that will face the significant negative impacts of these requirements.

of their build-out erects an unreasonable procedural hurdle into the video franchising process that could dissuade some small providers from seeking franchises.

IV. IF THE COMMISSION DOES REQUIRE PRE-QUALIFICATION OF BUILD-OUT REASONABLENESS, AN APPROPRIATE SAFE HARBOR MUST ALSO BE ESTABLISHED.

As discussed above, the most straightforward reading of the DIVCA requirements is that smaller providers were never intended to be subject to a pre-qualification procedure regarding the reasonableness of their build-out. However, if the Commission moves forward with this proposal, the Proposed Decision correctly identifies the need for an appropriate safe harbor. The Small LECs believe that the SureWest TeleVideo proposal would be a reasonable safe harbor for smaller providers. *See Proposed Decision*, at p. 9. For fiber-based systems, this safe harbor would require 25% build-out within four years, and 40% build-out within 10 years. For non-fiber-based systems, the proposal would require 35% build-out within six years, and 50% build-out within 10 years. This less onerous safe harbor would be more consistent with the Legislature's intent to reduce the specific build-out burdens on smaller providers. Another reasonable approach would be to adopt a safe harbor that adds a year or two to each of the Section 5890(e) standards.

Regardless of what safe harbor is adopted, it is critical that there be a safe harbor. By complying with the safe harbor provisions, a small video provider should be deemed fully complaint with the "reasonableness" requirement of Section 5890(c). Further, the Proposed Decision should be revised to clarify that smaller providers who meet the safe harbor will be subject to the automatic extension requirements of Sections 5890(e)(3) and (4). Sub-sections (e)(3) and (e)(4) provide extensions on the build-out requirements where providers have not yet achieved a subscribership rate of 30% or greater.

Both the safe harbor provisions and the various extension options in Public Utilities Code Sections 5890(e) and 5890(f) should be incorporated into a revised version of G.O. 169. The current draft of G.O. 169 does not include any reference to the discretionary build-out extension provision under Section 5890(f). A safe harbor provision that is less rigorous than the Section 5890(e) standard should be inserted into Section VI(B)(1)(2) of the General Order, and a new Section VI(B)(1)(3) should be adopted containing the extension provisions.

V. REPORTS ON VIDEO SUBSCRIBERSHIP ARE NOT NECESSARY TO MONITOR THE REASONABLENESS OF PROVIDERS' BUILD-OUT.

The Proposed Decision exceeds the Commission's monitoring authority under Public Utilities Code Section 5890 by requiring the submission of data regarding how many customers subscribe to a franchisee's video service. *See Proposed Decision*, Ordering Paragraph 2(d). To demonstrate that build-out is sufficient in a given area, a provider need not show that customers are actually subscribing to video service. Rather, it should be sufficient that the service is available in a reasonable portion of the provider's video franchise territory. The information provided pursuant to the existing G.O. 169 should be sufficient to meet the Commission's non-discrimination and build-out monitoring responsibilities. Subscribership data is relevant to the analysis of whether the Section 5890(e)(3) and (4) extension provisions are triggered, but evidence of subscribership can be supplied by providers as necessary in that context. There is no statutory reason to collect subscribership data generally.

VI. CONCLUSION.

The Small LECs urge the Commission to modify the Proposed Decision as set forth above. The build-out and non-discrimination standards in the Proposed Decision are unsupported by DIVCA, and they raise a host of implementation concerns as applied to smaller providers. The Commission should avoid the legal and technical errors in the Proposed Decision by eliminating the low-income penetration quota as to smaller providers, and by removing the

requirement that smaller providers must proactively demonstrate the reasonableness of their build-out plans. However, the Commission must ensure that there is a reasonable safe harbor provision in G.O. 169. The Commission should also incorporate the safe harbor provision and the associated build-out extension options into the General Order.

The subscribership data proposed to be collected under G.O. 169, Section VII(C), is unnecessary. This requirement should also be eliminated. The proposal to provide notices of "imminent market entry" to incumbent cable companies is reasonable, and it should be adopted. The Small LECs also support the Proposed Decision's conclusion that adopting franchise renewal procedures would be premature at the present time.

Dated this 13th day of September, 2007, at San Francisco, California.

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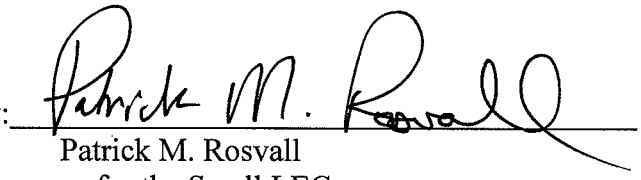
By: 

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CERTIFICATE OF SERVICE

I, Noel Gieleghem, declare:

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is COOPER, WHITE & COOPER LLP, 201 California Street, 17th Floor, San Francisco, CA 94111.

On September 13, 2007, I served the

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RESOLVING ISSUES IN PHASE II

by sending via e-mail a true and correct copy in Adobe Acrobat PDF searchable format to the parties on the CPUC's service list for Proceeding No. R. 06-10-005 who provided e-mail addresses.

Hard copies were served via U.S. Mail on the two parties on the service list who did not provide an e-mail address. Hard copies were also mailed Assigned ALJ Kotz and to Jane Whang, Advisor to Assigned Commissioner Chong.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 13, 2007, at San Francisco, California.

Noel Gieleghem

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